

231751

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35504

**UNION PACIFIC RAILROAD COMPANY –
PETITION FOR A DECLARATORY ORDER**

ENTERED
Office of Proceedings

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Public Record

OPENING COMMENTS OF BNSF RAILWAY COMPANY

BNSF is submitting the following opening comments pursuant to the Surface Transportation Board's December 12, 2011 decision in this proceeding. As explained below, the Board should issue a declaration in this proceeding that it is permissible for railroads to include in their common carrier price authorities a requirement that shippers of TIH commodities indemnify the railroad against liabilities arising from injury and damages due to the release of a TIH commodity while in the railroad's possession resulting from causes other than the negligence of the railroad.

The Board initiated this proceeding in response to a petition of Union Pacific Railroad Company ("UP") for a declaratory order regarding certain liability and indemnification provisions set out in Items 50 and 60 of UP's Tariff 6607. Specifically, UP sought a declaration from the Board that "it can reasonably require, as a condition of providing common carrier service for TIH, that the TIH shipper accept responsibility for liabilities that are not caused by UP's negligence." *See* Petition of Union Pacific Railroad Company for a Declaratory Order, at 7, filed April 27, 2011.

BNSF takes no position on the reasonableness of the specific provisions of the UP tariff items that are the subject of this proceeding. Moreover, BNSF does not believe that the Board should adopt or prescribe a uniform approach for allocating responsibility for liabilities arising

from the transportation of TIH. There are a number of different approaches that can be taken to allocate responsibility among the parties involved in a transportation service for liabilities resulting from accidents that occur in connection with the transportation of a shipper's freight, including releases of TIH commodities or other hazardous materials. For example, in *Common Carrier Obligations of Railroads – Transportation of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No.1), the Association of American Railroads requested that the Board issue a formal policy statement making it clear that railroads could, if they chose to do so, require that a shipper of hazardous materials indemnify the rail carrier for liability exposures exceeding a certain threshold, regardless of the cause of the liability exposure. *See* Written Testimony of the Association of American Railroads, at 5-6, STB Ex Parte No. 677 (Sub-No.1), filed July 10, 2008. UP's Tariff Items at issue in this proceeding take a different approach and allocate responsibility for liabilities based on the cause of the liability exposure rather than the extent of the exposure. Railroads independently develop the liability terms that are contained in their respective common carrier pricing authorities, and the Board should not issue a declaration that limits the approach that can be taken in any particular case.

However, BNSF does believe that the Board should declare in this proceeding that it would be permissible for a railroad, if it chooses to do so, to require that a shipper of TIH commodities indemnify the railroad against liability for injury and damages due to the release of a TIH commodity while in the railroad's possession resulting from causes other than the negligence of the railroad. The Board should make it clear that other rules regarding liability due to the release of TIH commodities may be reasonable and that the Board is not limiting the approaches a railroad might take in allocating liability. For example, there may be circumstances in which it would be reasonable for a railroad to shift some risk associated with the railroad's

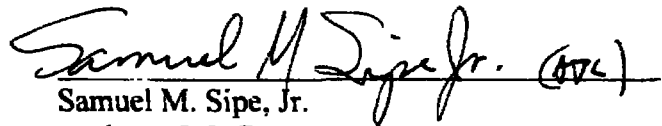
negligence to the shipper. The Board should not preclude such an approach prior to considering a specific liability provision. But there are strong policy reasons suggesting that, at a minimum, the Board should declare that it would be reasonable for a railroad to have the option to shift the risk of liability resulting from causes other than the negligence of the railroad to a TIH shipper.

Even though accidents involving TIH commodities have been extremely rare, the risk of a catastrophic accident involving the transportation of TIH commodities cannot be entirely eliminated. There is a strong public interest in reducing the potential exposure of the public to the risk of a TIH-related transportation accident to the maximum extent possible. Railroads can reduce that exposure only to the extent that railroads have control over their own actions and decisions. But because railroads, as common carriers, are obligated to provide transportation of TIH commodities in response to reasonable requests for service, decisions as to how much TIH moves by rail and between what origins and destinations are made by shippers. It is in the public interest for railroads to be able to adopt incentives and disincentives, including liability shifting provisions, that will both protect the railroads and encourage shippers to pursue actions which will reduce the overall risk of public exposure to TIH commodities.

If a TIH shipper knows it would be partially or fully responsible for the enormous costs associated with accidents that are beyond the control of a railroad, the shipper will have strong incentives to make rational market-based decisions regarding the transportation of TIH that reduce the risk of public exposure to a TIH incident. For example, shippers would have strong incentives to market TIH in ways that minimize exposure to catastrophic accidents, such as by minimizing the length of rail movements of TIH. Similarly, shippers would have strong incentives to substitute as much as possible less hazardous commodities for more dangerous commodities that create a higher risk to the public. Imposing more of the risk of accidents that

are outside of the control of the handling railroad on TIH shippers will promote rational decisions that are in the public interest regarding the marketing and distribution of TIH commodities.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2012, I caused a copy of the foregoing to be served by e-mail or first-class mail, postage prepaid, upon all parties of record in this case as listed below.

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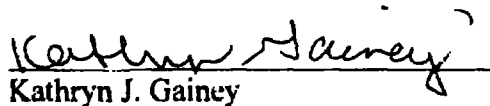
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